Supreme Court, U. S.
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No. 95-1344

In The

Supreme Court of the United States

October Term, 1995

ELFIDA CHAVEZ,

Petitioner,

v.

THE HOUSING AUTHORITY OF THE CITY OF EL PASO,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state rule of procedure, consistent with constitutional safeguards, exclude, as a mechanism to extend the time within which to perfect an appeal, a request for findings of fact and conclusions of law in the context of a summary judgment proceeding.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Housing Authority of the City of El Paso (EPHA), Respondent herein, prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

OPINIONS BELOW

Petitioner's appendices set forth the relevant opinions of the courts below.

JURISDICTION

Jurisdiction exists under 28 U.S.C. §1257(a).

STATUTES AND REGULATIONS INVOLVED

(a) Appeals in Civil Cases.

(1) Time to Perfect Appeal. When security for costs on appeal is required, the bond or affidavit in lieu shall be filed with the clerk within thirty days after the judgment is signed, or, within ninety days after the judgment is signed if a timely motion for new trial has been filed by any party or if any party has timely

> filed a request for findings of fact and conclusions of law in a case tried without a jury. If a deposit of cash is made in lieu of bond, the same shall be made within the same period.
>
> Tex. R. App. P. 41(a)(1).

STATEMENT OF THE CASE

This is an eviction case. Elfida Chavez is a lessee of an apartment owned by EPHA. The parties have been involved in forcible detainer and related proceedings since 1991.

The original action, filed in the justice of the peace court, was interrupted by a challenge in federal court to a housing authority lease provision. The challenge was directed to a portion of the lease required by federal regulation to be implemented by all public housing authorities.

The lessee was obligated "to conduct himself and cause other persons who are on the premises with his consent to conduct themselves in a manner which will not disturb the neighbors' peaceful enjoyment of their accommodations and will be conducive to maintaining the project in a decent, safe, and sanitary condition; [and] to refrain from illegal or other activity which impairs the physical or social environment of the project." 24 C.F.R. §966.4(f)(11), (12). The EPHA lease contained a corresponding provision, and satisfied both 24 C.F.R. §966.4 and 42 U.S.C. §1437d(1)(5).

Chavez' suit, which claimed infringement upon association generally and family relationships in particular,

failed. *Chavez v. Housing Authority*, 973 F.2d 1245 (5th Cir. 1992). In the litigation a variety of factual findings had been made by the trial court and affirmed by the court of appeals. The findings related to the violent and criminal activities of her son on EPHA property.

When the federal proceedings were concluded and the matter returned to the state forum, a motion for summary judgment was filed by EPHA. The motion asserted that various factual matters had been determined in the federal courts, and that the doctrine of collateral estoppel or issue preclusion should be applied. The state trial court granted the motion for summary judgment.

Chavez then requested findings of fact and conclusions of law on July 19, 1993. None were made by the trial court. Chavez later appealed to the intermediate state appellate court, and EPHA maintained that the appeal was untimely because the deadline to appeal had not been extended. After initially ruling against EPHA, the court reconsidered, and granted EPHA's motion to dismiss.

The trial court's order granting summary judgment was signed on June 28, 1993. Under Texas practice, an appeal must be perfected within thirty (30) days of the signing of the judgment, unless extended. Tex. R. App. P. 41(a)(1). A certificate of deposit in lieu of cash was filed by Chavez with the clerk on September 27, 1993. If timely, this would have perfected the appeal, but it was well beyond the thirty (30) day period.

At issue in the court below was whether Chavez took any of the necessary steps to extend the time period. This

could have occurred by either filing a motion for new trial or by requesting findings of fact and conclusions of law had the case been tried without a jury. Rule 41(a)(1).

The appeal was dismissed because the timelines could not be extended, under the state rule, by a request for findings of fact and conclusions of law in a summary judgment case. A "trial" did not occur in the manner required by Rule 41(a)(1).

The issue for the state appellate court was whether the request for findings and conclusions extended the timelines in the context of a summary judgment proceeding. Stated more narrowly, the issue was whether a summary judgment hearing could be defined as a matter "tried without a jury," and, therefore, a mechanism by which to extend time. The court answered in the negative.

Chavez then unsuccessfully sought a writ of error in the Texas Supreme Court. From this denial, Chavez now seeks redress in the United States Supreme Court.

REASONS TO DENY THE WRIT

Chavez was entitled to a "fair trial in a fair tribunal." *In Re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1965). The presence of such fundamental fairness in a judicial proceeding satisfies any due process claim.

Chavez' claim does not go to whether the overall hearing procedure was adequate to protect a private interest. There is no assertion that (1) adequate notice was not received; (2) the decision maker was not neutral; (3)

the opportunity to make an oral presentation to the decision maker was denied; (4) the right to present evidence or witnesses was abridged; (5) the right to cross-examine witnesses was denied; (6) legal counsel was denied; or (7) the decision not based on the record. The traditional safeguards to insure a fair trial were honored in the trial of Chavez' case.

The eviction proceeding and subsequent appeal afforded Chavez the opportunity to be heard at a meaningful time and in a meaningful manner. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970); *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187 (1965). Notice was given and time to prepare for trial was afforded. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950); *Roller v. Holly*, 176 U.S. 398, 20 S.Ct. 410 (1900). The opportunity to confront and cross-examine adverse witnesses was not compromised. *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400 (1959). The decision rested solely on the evidence adduced at trial, *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970), and Chavez was represented by legal counsel. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932). Trial and appeal were before judges who were impartial, and had no direct or substantial pecuniary interest in reaching a decision against Chavez. *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437 (1927).

Chavez' complaint is directed to a single civil appellate rule which is said to violate both her due process and equal protection rights. As stated above, Chavez requested findings of fact and conclusions of law in a summary judgment proceeding. Rule 41(a)(1) states that such a request may be made "in a case tried without a jury." Nothing connected with a summary judgment

involves a trial to the court in regard to weighing facts. Indeed, the entire procedure presumes an absence of material facts.

The issue determined by the Texas Eighth Court of Appeals, sitting in El Paso, was whether the request made by Chavez extended the appellate timetable. The court held that the timetable was not extended. In reaching this decision, the court applied the then recent Texas Supreme Court of *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994). The holding in *Linwood* was unequivocal: because findings of fact and conclusions of law have no place in a summary judgment proceeding, a request for them does not extend the appellate timetable. The reference in Rule 41(a)(1) to cases "tried without a jury" did not include summary judgment hearings.

The holdings of the Texas Supreme Court and the El Paso Court of Appeals were not unpredicted. Several courts, including the Texas Supreme Court, had stated, well before the case at hand, that findings of fact had no place in state summary judgment procedures. *State v. Easley*, 404 S.W.2d 296, 297 (Tex. 1966); *KT Bolt Mfg. Co. v. Texas Elec. Coop., Inc.*, 837 S.W.2d 273, 274 n.1 (Tex.App. – Beaumont 1992, writ denied); *Robbins v. Warren*, 782 S.W.2d 509, 511 (Tex.App. – Houston [1st Dist.] 1989, no writ).

Still another state court of appeals had held that findings of fact and conclusions of law were permissible in state practice only in a case tried on the merits. *State Farm Fire & Casualty Co. v. Reed*, 826 S.W.2d 659, 661 (Tex.App. – Houston [14th Dist] 1992), *aff'd*, 873 S.W.2d 698 (Tex. 1993). The Houston court held that the review of

docket entries were "especially inappropriate" in a summary judgment proceeding "because it would be reviewing them as if they were findings of fact and conclusions of law." *Id.*

Moreover, another Texas procedural rule directly states that findings of fact and conclusions of law are to be employed in cases "tried in district or county court without a jury." Tex. R. Civ. P. 296. A case may be said to be "tried" when conflicting evidence is presented in an evidentiary hearing. *Timmons v. Luce*, 840 S.W.2d 582, 586 (Tex.App. – Tyler 1992, no writ). A contrary interpretation would "ignore the clear and concise language of rule 41(a)(1) and render the word 'tried' meaningless." *Zimmerman v. Robinson*, 862 S.W.2d 162, 164 (Tex.App. – Amarillo 1993, no writ).

Chavez, accordingly, cannot claim to have been surprised by the ultimate holding by the El Paso court. Prior case law, as well as the rules themselves, indicated that she should have, and could have, extended the timelines in a different manner.

While the corresponding federal rules have been interpreted somewhat differently, they nonetheless make it clear that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule." Fed. R. Civ. P. 52. Federal appellate courts, on occasion, have directed trial courts to give specific factual indications as to why unclear summary judgments were granted. *U.S. v. Woods*, 885 F.2d 352 (6th Cir. 1989); *Myers v. Gulf Oil Corp.*, 731 F.2d 281 (5th Cir. 1984). Formal findings and conclusions, however, are still not

required, and, indeed, the rule states they are unnecessary. *Stewart v. U.S.*, 716 F.2d 755 (10th Cir. 1982), *cert. denied*, 469 U.S. 1018, 105 S.Ct. 432 (1984).

Reference to the federal procedural approach to findings of fact and conclusions of law is made to emphasize that findings and conclusions, in both state and federal practice, are designed to set out the reasons for a decision in a contested trial without a jury. By its very definition, a summary judgment in either the state or federal forum, if granted, can have no facts to find because there is an absence of contested facts.

While the federal and state rules may be similar, nothing requires them to parallel one another or to be interpreted in an identical fashion. Texas and the other states may regulate their own judicial procedures, according to their respective concepts of fairness, unless a procedure offends fundamental fairness. *Dohany v. Rogers*, 281 U.S. 362, 50 S.Ct. 299 (1930); *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 52 S.Ct. 69 (1931).

Chavez was not denied the right to appeal. The method perfecting an appeal in Texas is to post a cost bond or affidavit within thirty (30) days after the judgment is signed. Tex. R. App. P. 41(a)(1). Late filing is permitted within fifteen (15) days after the last day allowed if a motion is made reasonably explaining the need for an extension. Rule 41(a)(2).

If a motion for new trial is made or if findings of facts and conclusions of law are requested in a non-jury trial, the time to perfect the appeal is extended to ninety (90) days from the date judgment was signed. Rule 41(a)(1). Chavez made no motion for new trial and improperly

asked for findings and conclusions. No extension occurred. She made no motion to extend time for good cause shown. She had thirty (30) days within which to perfect her appeal and failed to do so.

Chavez argues that the Texas Supreme Court's interpretation of its own rule is erroneous. Assuming *arguendo* that the court changed or altered the existing rule adversely to Chavez, her argument still should fail. A litigant does not have a vested right in any given mode of procedure. *Denver & R. G. W. R. Co. v. Brotherhood of R. R. Trainmen*, 387 U.S. 556, 87 S.Ct. 1746 (1967); *Keller v. Dravo Corp.*, 441 F.2d 1239 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017, 92 S.Ct. 679 (1972); *Congress of Racial Equality v. Town of Clinton*, 346 F.2d 911 (5th Cir. 1964). Chavez had no vested right to appeal in a certain manner.

Chavez' unsuccessful appeal cannot, without more, be considered as evidence that due process was violated. *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 58 S.Ct. 185 (1937). Due process is not a guarantee of a correct or consistent decision. *Id.* It certainly does not guarantee a favorable outcome.

The procedures concerning civil appeals in Texas are designed to allow litigants access to judicial review without undue difficulty. Requiring timely adherence to the rules is not unreasonable, and passes constitutional muster.

The timely filing of a cost bond or equivalent "is a necessary and jurisdictional step in perfecting an appeal." *Davies v. Massey*, 561 S.W.2d 799, 801 (Tex. 1978) (orig. proceeding); *Lone Star Ford, Inc. v. McCormick*, 838 S.W.2d 734, 742 (Tex.App – Houston [1st Dist.] 1992, writ

denied). The time period for filing a cost bond is jurisdictional. *Wadkins v. Diversified Contractors*, 714 S.W.2d 136, 137 (Tex.App. – Houston [1st Dist.] 1986, no writ). When an appeal is not timely perfected, the appellate court does not have authority to entertain the appeal. *McDonald v. Newmyer*, 775 S.W.2d 652, 653 (Tex.App. – Houston [1st Dist.] 1989, writ denied).

A state court of appeals, however, does have jurisdiction over an appeal "if a party files an instrument in a bona fide attempt to invoke the appellate court's jurisdiction." *Linwood v. NCNB Texas*, 885 S.W.2d at 103. This holding reflects a long line of decisions of the Texas Supreme Court "that an appellant should be given an opportunity to amend a defective bond, a cash deposit in lieu of bond or an affidavit of inability before the court of appeals may dismiss the appeal." *Grand Prairie Indep. School Dist. v. Southern Parts Imports, Inc.*, 813 S.W.2d 499, 500 (Tex. 1991) citing *Woods Exploration & Producing Co. v. Arkla Equip. Co.*, 528 S.W.2d 560, 569 (Tex. 1975) (deposit in lieu of bond); *United Ass'n of Journeymen & Apprentices v. Borden*, 160 Tex. 203, 206, 328 S.W.2d 739, 741 (1959) (appeal bond); *Commercial Credit Corp. v. Smith*, 143 Tex. 612, 616, 187 S.W.2d 303, 365 (1945) (affidavit of inability to post bond); *Walker v. Blue Water Garden Apartments*, 776 S.W.2d 578, 581-82 (Tex. 1989) (affidavit of inability to post bond and deposit rent).

The problem in the case at bar is that Chavez filed nothing, defective or otherwise, indicating the intention to appeal. An instrument which extends a timeline in certain circumstances is not an invocation of the actual appellate process.

The earlier Texas cases are best summed up by *Woods Exploration*, 528 S.W.2d at 570, a case that dealt with the predecessor of Tex. R. App. P. 46(f):[1]

> This rule is liberally construed and applied to carry out its intended purpose. If the appellant files any sort of instrument that is intended to be a bond and to invoke appellate jurisdiction, the instrument may, on timely request, be amended to cure any defect of either form or substance.

This same test has been repeated in *Borden*, 328 S.W.2d 741; *Walker*, 776 S.W.2d at 581; *Grand Prairie Indep. School Dist.*, 813 S.W.2d at 500; and *Linwood*, 885 S.W.2d at 103. This is hardly the stuff of an inflexible system discouraging appeals.

In the case at bar, nothing was filed during the thirty (30) days after the judgment except the improper request for findings of fact and conclusions of law. No bond, affidavit, notice of appeal or bond substitute was filed. If some defective instrument, in the nature of a bond or substitute, had actually been filed, an argument in favor of jurisdiction could be made under *Linwood* and the cases cited above. Chavez has no such argument, and could make none in the Texas courts.

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[1] Rule 46(f) states: "On motion to dismiss an appeal or writ of error for a defect of substance or form in any bond or deposit given as security for costs, the appellate court may allow the filing of a new bond or the making of a new deposit in the trial court on such terms as the appellate court may prescribe. A certified copy of the new bond or certificate of deposit shall be filed in the appellate court.

In *Linwood*, the appellant incorrectly filed a notice of appeal, rather than a bond, within the thirty (30) day period after judgment; in *Grand Prairie Indep. School Dist.*, the appellant also timely filed a defective notice of appeal; and in *Walker*, the appellant filed an incomplete affidavit of inability to pay costs and failed to meet other rules regarding evictions. The fundamental point in these, and the other cases discussed herein, is that **something** was timely filed that indicated an appeal was desired. In the words of Justice Nathan Hecht of the Texas Supreme Court, "a cost bond, even if defective, is sufficient to confer jurisdiction upon the appellate court as long as the instrument may be said to be a bond." *Walker*, 776 S.W.2d at 581.

A request for findings of fact and conclusions of law does not invoke appellate jurisdiction. The findings and conclusions, once made, are analogous to a jury verdict, and have the same force and effect. *Williams v. Planters' & Mechanics' National Bank*, 91 Tex. 651, 45 S.W. 690 (1898); *Summit Bank v. The Creative Cook*, 730 S.W.2d 343 (Tex.App. – San Antonio 1987, no writ). While a proper request for findings and conclusions will extend the appellate timetable, Tex. R. App. P. 41(a)(1), no Texas case ever has equated a request for findings and conclusions with appellate jurisdiction. Indeed, without filing an appeal bond under Tex. R. App. P. 40, the appellate court would never be aware that a request had been made, or that findings and conclusions had been rendered. A request, if properly made, merely gives the requestor additional time to perfect an appeal. It lays the groundwork upon which an appeal may be later based. It does not manifest the intention to appeal.

The filing of a request for findings and conclusions cannot be equated with a bond or bond substitute. The request, in sum, is not an "instrument [that] may be said to be a bond." *Walker*, 776 S.W.2d at 581.

Without an extended timetable, the only colorable argument Chavez could assert to the state courts was that the request for findings and conclusions itself was an instrument filed in a bona fide attempt to invoke appellate jurisdiction. This is not what the *Linwood* line of cases has held, and was rejected in the state appeal. A bond or substitute was required to be filed in a timely manner, after which, if the instrument was defective, Chavez could have corrected or amended the instrument. It would have been erroneous to expand the *Linwood* holding to include a request for findings and conclusions within the definition of appellate instruments. Certainly, no constitutional right is implicated in the *Linwood* holding or the application of same.

It was clear to the intermediate state appellate court after the issuance of *Linwood*, 885 S.W.2d at 103, that the timetable was not extended. The express language of *Linwood* lends itself to no other interpretation: unless the deadline is extended, a bona fide attempt to appeal must be undertaken within thirty (30) days. During this time period no act was taken to invoke appellate jurisdiction. The appeal was correctly dismissed.

CONCLUSION

The method by which litigants in the Texas court system may appeal adverse decisions is reasonable and consistent. The time limitations are well defined and easily calculated. Rule 41(a)(1) extends the time within which to appeal in clearly set out circumstances. Chavez was charged with knowledge of the rules regarding deadlines and extensions. Prior reported opinions additionally gave every indication that the appellate timetable would not be extended in the manner undertaken by Chavez. No constitutional right was implicated when the subject rule was enforced in accordance with its terms. For these and the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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